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No. 229

Supreme Court U.

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In the

Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA,

Petitioner,

v.s.

ANTONIO DIONISIO and CHARLES BISHOP SMITH,
WITNESSES BEFORE THE SPECIAL FEBRUARY
1971 GRAND JURY,

Respondents.

On Petition For Writ of Certiorari To the United States
Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT, CHARLES BISHOP SMITH, IN OPPOSITION

FRANK G. WHALEN

111 West Washington Street

Chicago, Illinois 60602

Attorney for Charles Bishop Smith

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REASONS FOR DENYING THE WRIT

The Government's petition for writ of certiorari violates the letter and spirit of Supreme Court Rule 19. Petitioner and respondent have only an academic interest in the outcome of this litigation. Petitioner's petition for rehearing was denied in the United States Court of Appeals for the Seventh Circuit on June 14, 1971. Justice Mar-

shall extended the time for the filing of the petition for writ of certiorari up to and including August 13, 1971. Three days prior to the expiration of the latter date, that is, August 10, 1971, respondent was indicted in Case No. 71 CR 788 and charged in fifteen counts with violating Sections 1952 and 1954 of Title 18, United States Code, the exact offenses for which he was subpoenaed and directed to give his voice exemplars to the Grand Jury.

Respondent is not only complaining of the invidious effect that the dragnet procedure has on the Fourth Amendment rights, as found by the Circuit Court of Appeals to be a practice condemned in *Davis v. Mississippi*, 394 U.S. 721, (Opinion 17) but is also complaining of the invidious effect that the bringing of an indictment three days before the filing of a petition for certiorari has on respondent's rights under the Fourth Amendment. Respondent is now in two separate courts on the same matter.

The Circuit Court of Appeals found that in the Government's petition for enforcement, the Government described compliance of the Grand Jury's demand for the exemplars as "essential and necessary to its investigation." It is now apparent that the exemplars were neither essential nor necessary. In addition, the Circuit Court of Appeals found (Opinion 16) that the Grand Jury had received in evidence voice recordings which were obtained under orders issued by the District Court pursuant to 18 USC Section 2518, but that "the interception order is no part of the record nor has it been furnished to Appellants." Neither the Court nor respondent is aware of any possible basis upon which the interception order was entered.

The United States Supreme Court has stated that the basic purposes behind the Fifth Amendment relate to preserving the integrity of a judicial system, *Tehan v. Shott*,

382 U.S. 406, 415; and that the Fifth Amendment is an expression of the moral striving of the community, *Malloy v. Hogan*, 378 U.S. 1, 9. The basic purposes behind the Fourth Amendment should not be less and the integrity of a judicial system is not enhanced when the Government indicts a citizen three days prior to the filing of a petition for certiorari in the same matter.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

FRANK G. WHALEN
Attorney for Respondent,
Charles Bishop Smith

In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO DIONISIO AND CHARLES BISHOP SMITH

STATEMENT OF DISMISSAL AS TO RESPONDENT SMITH
UNDER RULE 60

The grand jury in this case subpoenaed respondents Smith and Dionisio as witnesses to obtain voice exemplars for identification purposes. When they refused to appear, the district court adjudged them guilty of civil contempt. The court of appeals reversed and on August 13, 1971, the government filed a petition for a writ of certiorari.

Since the filing of the petition, the grand jury has indicted respondent Smith and no longer seeks to compel him to appear as a witness. Accordingly, the United States requests dismissal of the petition as to respondent Smith. It continues, however, to seek review of the judgment pertaining to respondent Dionisio.

Counsel for respondent Smith has no objection to this dismissal.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1971.